

1 Honorable Thomas S. Zilly  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

11 CHAD EICHENBERGER, individually and on  
12 behalf of all others similarly situated,  
13

Plaintiff,

14 v.  
15

16 ESPN, INC., a Delaware corporation,  
17

Defendant.

Case No.: 2:14-cv-00463

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

19 Plaintiff Chad Eichenberger (“Eichenberger”) brings this First Amended Class Action  
20 Complaint and Demand for Jury Trial (“Complaint”), individually and on behalf of all others  
21 similarly situated, against Defendant ESPN, Inc. (“ESPN”) to put an end to its wrongful practice  
22 of disclosing its users’ sensitive information, and to obtain redress for such conduct. Plaintiff  
23 alleges as follows upon personal knowledge as to himself and his own acts and experiences and,  
24 as to all other matters, upon information and belief, including investigation conducted by his  
25 attorneys.

## NATURE OF THE ACTION

1. ESPN is one of the largest producers of sports-related news and entertainment programming in the world. Perhaps best known for its eponymous television channel, ESPN also offers content to consumers via other media including its proprietary software application (the “WatchESPN Channel”) that it developed for use with a digital media-streaming device called the Roku.<sup>1</sup>

2. Unbeknownst to ESPN users, each time they use the WatchESPN Channel to watch sports or other media content, ESPN knowingly discloses their personally identifiable information—including a record of every video clip viewed by the user (collectively, “PII”)—to unrelated third parties. In addition to demonstrating a disregard for its users’ privacy rights, ESPN’s actions also violate the Video Privacy Protection Act, 18 U.S.C. § 2710 (“VPPA”), which prohibits companies from disclosing their customers’ video viewing records to third parties without express written consent.

3. ESPN's violations of the VPPA are particularly flagrant here, as it programmed the WatchESPN Channel to transmit users' PII to a third party data analytics company. The business models of such "big data" analytics companies center on the collection of disparate pieces of uniquely identifying information and online behavioral data about individual consumers, which they then compile to form comprehensive profiles about a person's entire digital life. These profiles can then be used for targeted advertising, sold as a commodity to other data brokers, or both.

4. In an era when the collection and monetization of consumer data proliferates on an unprecedented scale, it's important that companies are held accountable for the exploitation of their users' sensitive information. ESPN chose to disregard Plaintiff's and thousands of other users' statutorily protected privacy rights by releasing their sensitive data into the marketplace.

<sup>1</sup> Roku is a digital media-streaming device that delivers videos, news, games, and other content to consumers' televisions via the Internet.

1 Accordingly, Plaintiff brings this Complaint against ESPN for its intentional and unlawful  
 2 disclosure of his PII in violation of the VPPA.

3 **PARTIES**

4 5. Plaintiff Chad Eichenberger is a natural person and citizen of the State of  
 5 Washington.

6 6. Defendant ESPN, Inc. is a corporation existing under the laws of the State of  
 7 Delaware with its principal place of business located at 935 Middle Street, Bristol, Connecticut  
 8 06010. ESPN conducts business throughout this District, the State of Washington, and the United  
 9 States.

10 **JURISDICTION AND VENUE**

11 7. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 as this  
 12 action arises under the VPPA. This Court has personal jurisdiction over ESPN because it  
 13 conducts business in this District and the wrongful conduct occurred in, was directed to, and/or  
 14 emanated from this District.

15 8. Venue is proper in this District under 28 U.S.C. § 1391(b) because ESPN  
 16 conducts business in this District, the improper conduct alleged in this Complaint occurred in  
 17 this District, the injury arose in this District, and Plaintiff resides in this District.

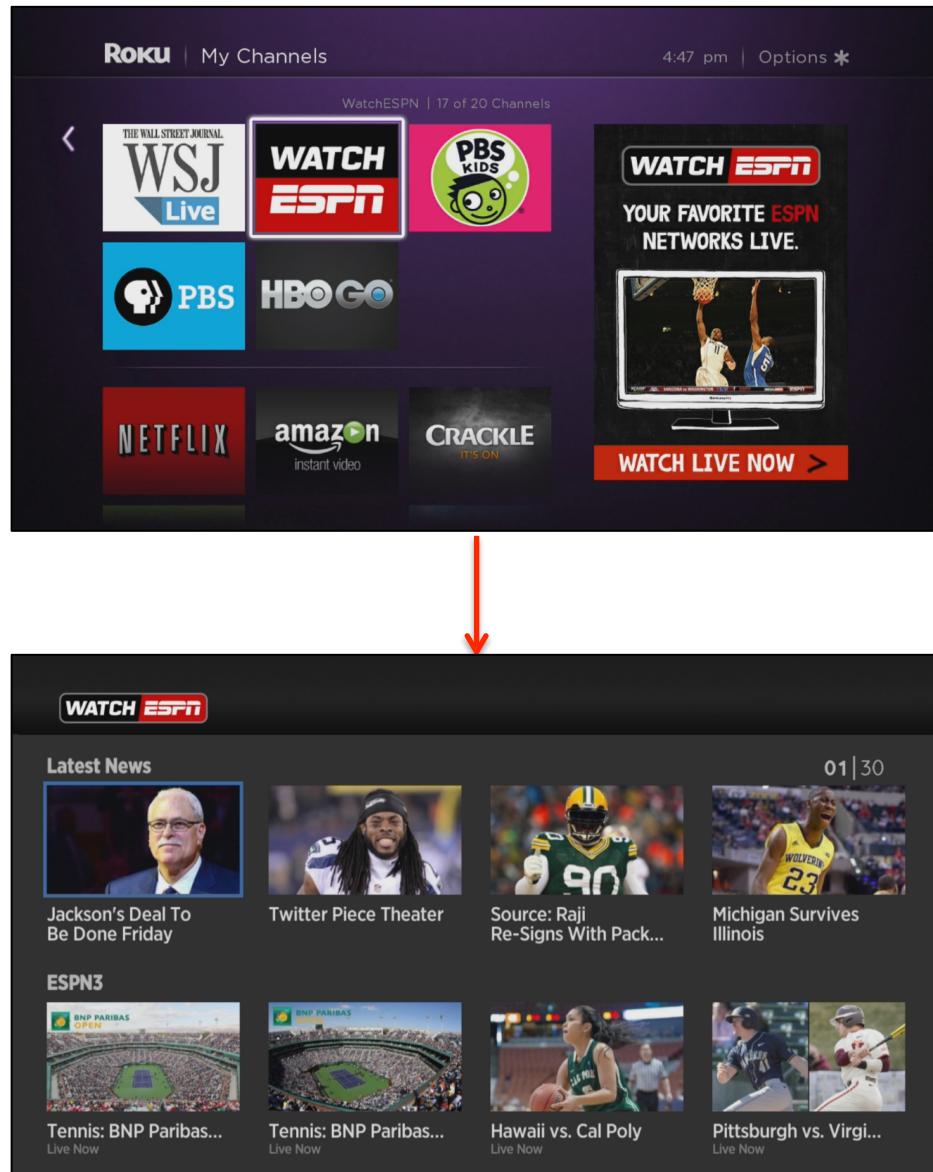
18 **FACTUAL BACKGROUND**

19 **I. ESPN Programmed the WatchESPN Channel to Transmit Users' PII and Video  
 20 Viewing Activity to a Third Party Data Analytics Company Without Users'  
 21 Consent.**

22 9. The WatchESPN Channel is a software application that allows consumers to view  
 23 ESPN's sports-related news and entertainment programming on their televisions via the Roku  
 24 media-streaming device.

25 10. To install the application on a Roku, users must visit the Roku Channel Store—  
 26 Roku's proprietary online digital media platform where users can download applications (called  
 27 "channels") that allow them to view specific television shows or video clips on their devices.

1 11. Once downloaded and installed, and upon opening the application, the  
 2 WatchESPN Channel presents a main home screen where the user can view certain of ESPN's  
 3 proprietary video programming. (See Figure 1 below, showing the WatchESPN Channel's main  
 4 home screen.)

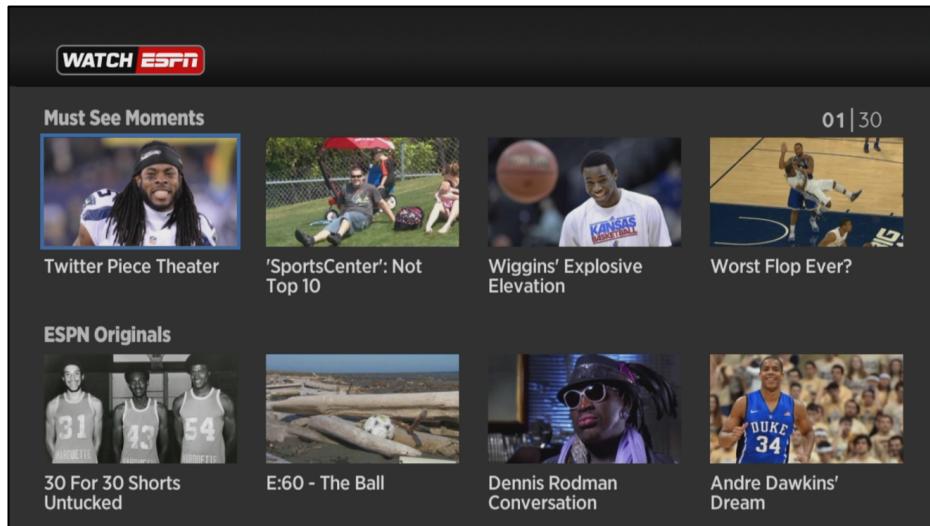


24 (Fig. 1.)

25 12. At no time during this process, however, does ESPN seek or obtain the consent of  
 26 the user to share or otherwise disclose his or her PII to third parties for any purpose.  
 27

1           **A. The WatchESPN Channel sends its users' video viewing records and**  
 2           **uniquely identifying PII to the third party data analytics company Adobe.**

3           13. The WatchESPN Channel is organized into categories accessible through the  
 4           software's main user interface. (*See Figure 1* above; *see also Figure 2* below, showing the  
 5           WatchESPN Channel's graphical user interface.) Users may browse these sections to view  
 6           sports-related events, news, and ESPN's own proprietary entertainment programming. (*See id.*)



15           (Fig. 2.)

16           14. Unbeknownst to its users, however, each time they view a video clip, the  
 17           WatchESPN Channel sends a record of the transaction to Adobe, an unrelated third party data  
 18           analytics company.<sup>2</sup> The complete record is sent each time that a user views a video clip, along  
 19           with the serial number associated with the user's Roku device.

20           **II. Data Analytics Companies Rely on Unique Identifiers Associated with Digital**  
 21           **Devices to Create Dossiers On Consumers and Their Digital Behaviors.**

22           15. Today's average consumer uses more than one device to access the Internet to do

23           2           Adobe is a company that offers data analytics and online marketing services that it claims  
 24           "allow [its] customers to create groundbreaking digital content, deploy it across media and  
 25           devices, measure and optimize it over time, and achieve greater business success." *See* Adobe  
 26           Company, <http://www.adobe.com/company.html?promoid=JZPLK> (last visited March 25, 2014).  
 27           Using its services, Adobe says, helps companies "make, manage, measure, and monetize their  
 content across every channel and screen." *Id.*

1 things like view digital content or make online purchases. This creates challenges for online  
 2 advertisers and data analytics companies. Namely, to gain a broad understanding of a given  
 3 consumer's behavior across all of the devices and applications that an individual uses, these  
 4 companies have to find ways to "link" their digital personas. The primary solution has been to  
 5 use unique identifiers to connect the dots.

6       16. Unique identifiers are used to precisely identify a person and to link their  
 7 activities across devices and applications. Data analytics companies—like Adobe—create user  
 8 profiles comprised of behavioral data and unique identifiers, often supplied by hardware  
 9 manufacturers.

10      17. An example of a hardware manufacturer unique identifier in the consumer  
 11 electronics context is a device's serial number. That's because device serial numbers are  
 12 "persistent identifiers," meaning they are unique to a specific device and remain constant for its  
 13 lifetime.

14      18. Roku itself explicitly acknowledges that its devices' serial numbers are linked to  
 15 the identities of their purchasers. In its Privacy Policy, Roku states that "[u]sage information  
 16 uploaded from Roku Devices is personally identifiable by product serial number" and that the  
 17 identifier can even be used to determine, among other demographic information, the precise store  
 18 and location where the product was purchased.<sup>3</sup>

19      19. Once Adobe matches a Roku serial number with an individual's identity, it's  
 20 exceedingly difficult for that person to avoid being tracked via their Roku device—making it  
 21 among the most stable and reliable identifiers for a given individual.

22      20. For these reasons, developers of software for the Roku rely on the device's serial  
 23 number to identify and track individual users.<sup>4</sup>

24      3      Roku Privacy Policy, <http://www.roku.com/about/privacy> (last visited June 4, 2014).

25      4      See Parker Higgins and Lee Tien, *Mobile Tracking Code of Conduct Falls Short of*  
 26 *Protecting Consumers*, Electronic Frontier Foundation (Oct. 26, 2013), available at  
<https://www.eff.org/deeplinks/2013/10/mobile-tracking-code-conduct-falls-short-protecting-consumers>.

1           **A.    Adobe and other data analytics companies maintain massive digital dossiers**  
 2           **on consumers.**

3           21.    ESPN partnered with Adobe because its analytics services provide insights into  
 4           the behaviors and demographics of WatchESPN's user base. This helps ESPN to, among other  
 5           things, accurately target advertisements to its users.

6           22.    The reason Adobe (or any other analytics company) is capable of developing a  
 7           complete understanding of an individual's digital activities is because it collects an enormous  
 8           amount of information about a given consumer's online behavior (as well as unique identifiers  
 9           associated with a user's devices) from a variety of sources.

10          23.    For instance, Roku channels that transmit the device's serial number along with a  
 11          record of the user's interaction with the software provide analytics companies with an intimate  
 12          look at the different types of materials consumed by the individual. By way of example, this data  
 13          may reveal, or help create inferences about, the person's political or religious affiliations,  
 14          sexuality, or general reading and viewing preferences.

15          24.    Once Adobe links a Roku's serial number with its owner, it can then connect new  
 16          information retrieved from a Roku channel—including from the WatchESPN Channel—with  
 17          existing data in the person's profile (which was previously collected by Adobe from other  
 18          sources). Evidence suggests that Adobe can determine a person's identity using the Roku serial  
 19          number because it obtains demographic information from Roku itself.

20          25.    Roku's Privacy Policy says that it "may share information collected from the  
 21          Roku Devices with content providers that have developed channels for the Roku Channel Store  
 22          [like ESPN]" as well as "third parties" that provide Roku with "analytics services."<sup>5</sup> Comments  
 23          from Adobe's senior employees indicate that Adobe is one of these "analytics services."

24          26.    The following exchange is from an interview with Adobe's senior product  
 25          manager, Christopher Comstock, where he talks about the company's ability to identify users

26          5       Roku Privacy Policy, <http://www.roku.com/about/privacy> (last visited June 4, 2014).

1 across devices:

2  
3           **Q:** What are your clients requesting when it comes to cross-device  
4            matching?

5           **Mr. Comstock:** This applies to advertisers and publishers. They're asking  
6            us first to be able to identify when they have a known customer ID. They  
7            want that ID to be the linking mechanism across different devices. From  
8            an AudienceManager standpoint, we can do that and tie those different  
9            device profiles to be a common user profile.<sup>6</sup>

10           27. Later in the interview, Mr. Comstock discusses the collection of data from Roku  
11            devices:

12           9           **Q:** Can you go into that? What are the different elements of cross-device  
13            your clients are talking about?

14           10           **Mr. Comstock:** For us, it's browser-to-browser or browser-to-app.  
15           11           Understanding those relationships. Work vs. home computers,  
16           12           understanding the behavior across those different devices. Mobile is the  
17           13           current trend but as we add Internet-connected TVs, **Roku devices** and  
18           14           with Comcast and Freewheel, the digital world is all over the place and it  
19           15           needs to extend beyond mobile, and have a platform able to bring in and  
20           16           capture devices in general. (Emphasis added).

21           24           28. Likewise, the Privacy Policy for Adobe's analytics services states that: "[s]ome  
22           25            companies using Adobe services may send us information that allows them to identify you  
23           26            personally. Some companies may also buy additional information about you and then add that  
24           27            additional information to the information collected by Adobe's products on their websites. This  
25           28            additional information may include things like email addresses, account information, or  
26           29            Facebook profile information, including photos and usernames."<sup>7</sup>

27           29. But this is only the tip of the iceberg. An excerpt from Adobe's marketing  
28           30            materials, shown in Figure 3 on the following page, portrays the vast array of information that  
29           31            feeds into a consumer's digital profile in Adobe's databases using information transmitted from  
30           32            sources like the Roku.

24  
25           6           The Cross-Device Question: Adobe, <http://www.adexchanger.com/data-exchanges/the-cross-device-question-adobe/> (last visited June 4, 2014).

26           7           Analytics and on-site personalization services,  
27           28            <http://www.adobe.com/content/dotcom/en/privacy/analytics.html> (last visited June 4, 2014).

Types of Customer Data	Characteristics	Source
One-to-One Data		Single Marketing View of Customer
Scoring Attributes	Lifetime value, RFM, risk score,	Customer Data Warehouse/Business Analytics
Implicit Customer Data (Behavioral Information)	Navigation history, opens, clicks, online transactions, other (POS, loyalty card activity...)	Web Analytics, Email, Mobile
Explicit Customer Data	Areas of interest, favorite products...	Form Capture, Landing Pages, Website
Computed Data	Estimated age, type of home...	Customer Data Warehouse/Business Analytics
Sociodemographic Data	Age, category, household structure, income	CRM, Third-Party Data Augmentation
Contact Information	Name, first name, address, email, phone number (home, business, or cell)	CRM

(Fig. 3.)

30. Figure 3 details the depth of information captured by Adobe's data analytics services. Of particular note are the "sources" of consumer data in the far right column. The graphic's references to these sources—including "Web Analytics" and "Customer Data Warehouse[s]"—implicate software applications (like WatchESPN for the Roku) that collect consumer data. These sources help Adobe generate profiles on individuals containing the wealth of information shown in the middle column of Figure 3. That information includes things like a person's: address, age, phone number, email, purchase history, behavioral activity, and income.

31. Mr. Comstock also commented on Adobe's wealth of data in his interview, where he stated that, "[Adobe] has much if not more data as the other [data-management] players in the space, and for us it's just taking those data elements and building a privacy-centric view of combining device data, looking at those data points and figuring out who may be the user across numerous devices, when we don't know who they are."<sup>8</sup>

32. Accordingly, in this context Adobe uses data obtained from either the WatchESPN Channel, Roku, or both, to personally identify users and associate their video

<sup>8</sup> See The Cross-Device Question: Adobe, *supra* note 6.

1 viewing selections with a personalized profile in its databases.

2       **B. The President and Congress are responding to growing privacy concerns**  
 3       **over the collection and misuse of personal information in the digital**  
 4       **marketplace.**

5       33. Concerns over the privacy risks associated with the collection and transmission of  
 6 PII from digital devices to third parties is no longer just academic musing. In a recently issued  
 7 sixty-two page policy memo, President Obama squarely addressed the issue, stating that there's a  
 8 growing problem with consumers' privacy "in the age of the Internet, the World Wide Web and  
 9 smartphones."<sup>9</sup> While the President's memo provided a "blueprint" for protecting consumers'  
 10 privacy, he called on Congress to take the lead and pass legislation to curb behavior related to the  
 11 corporate exploitation of user data.

12       34. For its part, Congress has started to take up these issues as well. In 2011, Senators  
 13 Patrick Leahy and Al Franken established the United States Senate Committee on the Judiciary,  
 14 Subcommittee on Privacy, Technology, and the Law that, among other things, oversees the laws  
 15 and policies governing (i) the collection, protection, use and dissemination of commercial  
 16 information by the private sector, including online behavioral advertising, privacy within social  
 17 networking websites and other online privacy issues, (ii) privacy standards for the collection,  
 18 retention, use and dissemination of personally identifiable commercial information, and (iii)  
 19 privacy implications of new or emerging technologies.<sup>10</sup>

20       35. In establishing this Subcommittee, Senator and Subcommittee Chair Al Franken  
 21 noted that "[t]he boom of new technologies over the last several years has made it easier to keep  
 22 in touch with family, organize a community and start a business . . . It has also put an

23       <sup>9</sup> Consumer Data Privacy In a Networked World: A Framework for Protecting Privacy and  
 24 Promoting Innovation in the Global Digital Economy,  
 25 <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf> (last accessed March 5, 2014).

26       <sup>10</sup> United States Senate Committee on the Judiciary, Subcommittee on Privacy, Technology  
 27 and the Law, <http://www.judiciary.senate.gov/about/subcommittees/privacytechnology.cfm> (last  
 28 visited March 5, 2014).

1 unprecedented amount of personal information into the hands of large companies that are  
 2 unknown and unaccountable to the American people.”<sup>11</sup>

3       36.      Members of other subcommittees have made similar remarks. In a meeting of the  
 4 Subcommittee on Consumer Protection, Product Safety, and Insurance, Senator John Rockefeller  
 5 noted that, “third parties use [consumer data] to target advertising on individuals . . . It is very  
 6 good business, but it is very cynical. It is an abuse of that power, passing on people’s profiles.”<sup>12</sup>

7       37.      In response to the increased scrutiny on consumers’ privacy concerns, companies  
 8 are also starting to change their data collection and usage practices. For instance, in the release of  
 9 Apple’s most recent mobile device operating system, iOS 7, Apple discontinued the ability to  
 10 transmit certain personally identifiable information to third parties for tracking purposes.<sup>13</sup>

11       38.      Despite the controversy surrounding these methods of harvesting and  
 12 commodifying sensitive consumer data, ESPN chose to disclose WatchESPN Channel users’  
 13 sensitive information to the third-party data analytics company Adobe.

14 **III. The VPPA’s Importance in the Digital Age.**

15       39.      When the VPPA was introduced, the late Senator Paul Simon noted that, “[e]very  
 16 day Americans are forced to provide to businesses and others personal information without  
 17 having any control over where that information goes. These records are a window into our loves,  
 18 likes, and dislikes.” S. Rep. No. 100-599 at 7–8 (1988). Senator Patrick Leahy, one of the  
 19 original drafters of the VPPA, also remarked that, “the trail of information generated by every

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21       <sup>11</sup>      Sen. Franken To Chair New Subcommittee on Privacy, Technology and the Law,  
 22      [http://www.franken.senate.gov/?p=hot\\_topic&id=1315](http://www.franken.senate.gov/?p=hot_topic&id=1315) (last visited March 5, 2014).

23       <sup>12</sup>      S. Hrg. 112-289, Consumer Privacy and Protection in the Mobile Marketplace,  
 24      <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg73133/html/CHRG-112shrg73133.htm> (last  
 25      visited February 17, 2014).

26       <sup>13</sup>      iOS 7 Eliminates MAC Address as Tracking Option, Signaling Final Push Towards  
 27      Apple’s Own Ad Identifier Technology, <http://techcrunch.com/2013/06/14/ios-7-eliminates-mac-address-as-tracking-option-signaling-final-push-towards-apples-own-ad-identifier-technology/>  
 28      (last visited March 5, 2014).

1 transaction that is now recorded and stored in sophisticated record-keeping systems is a new,  
 2 more subtle and pervasive form of surveillance.” *Id.* at 8.

3       40. While these statements rang true in 1988 when the act was passed, the importance  
 4 of legislation like the VPPA in the modern computing era is more pronounced than ever before.  
 5 During a recent Senate Judiciary Committee meeting, “The Video Privacy Protection Act:  
 6 Protecting Viewer Privacy in the 21st Century,” Senator Leahy emphasized this point, saying  
 7 that, “[w]hile it is true that technology has changed over the years, we must stay faithful to our  
 8 fundamental right to privacy and freedom. Today, social networking, video streaming, the  
 9 ‘cloud,’ mobile apps and other new technologies have revolutionized the availability of  
 10 Americans’ information.”<sup>14</sup>

11       41. Likewise, Senator Al Franken summed up the importance of the VPPA in today’s  
 12 world as follows: “[i]f someone wants to share what they watch, I want them to be able to do so .  
 13 . . But I want to make sure that consumers have the right to easily control who finds out what  
 14 they watch—and who doesn’t. The Video Privacy Protection Act guarantees them that right.”<sup>15</sup>

15 **IV. Plaintiff Eichenberger’s Experience with the WatchESPN Channel.**

16       42. Starting in early 2013, Plaintiff Eichenberger downloaded and began using the  
 17 WatchESPN Channel on his Roku media-streaming device to watch sports-related events and  
 18 news.

19       43. At no relevant time did Eichenberger consent, agree, or otherwise permit ESPN to  
 20 disclose his PII to any third-party data analytics companies.

21       44. Likewise, Eichenberger has never been given the opportunity to prevent the

22  
 23       <sup>14</sup> The Video Privacy Protection Act: Protecting Viewer Privacy in the 21st Century, Senate  
 24 Judiciary Committee Subcommittee on Privacy, Technology and the Law,  
 25 <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=f14e6e2889a80b6b53be6d4e412d460f>  
 (last visited February 17, 2014).

26       <sup>15</sup> *Chairman Franken Holds Hearing on Updated Video Privacy Law for 21st Century*,  
 27 frank.senate.gov (Jan. 31, 2012), [https://www.frank.senate.gov/?p=hot\\_topic&id=1923](https://www.frank.senate.gov/?p=hot_topic&id=1923).

WatchESPN Channel from disclosing his PII to third parties.

45. Nevertheless, each time Eichenberger viewed a video clip using the WatchESPN Channel, ESPN knowingly disclosed his PII—in the form of his unique Roku device serial number, along with the videos he viewed—to third party data analytics company Adobe. Given the wealth of information Adobe possesses about individual consumers, the information disclosed by ESPN to Adobe identified Eichenberger as having watched specific video materials.

## CLASS ALLEGATIONS

46. **Class Definition:** Plaintiff brings this action pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3) on behalf of himself and a Class of similarly situated individuals, defined as follows:

All persons in the United States who used the WatchESPN Channel to watch videos and who had their PII transmitted to Adobe.

Excluded from the Class are (1) Defendant, Defendant's agents, subsidiaries, parents, successors, predecessors, and any entity in which Defendant or its parents have a controlling interest, and those entity's current and former employees, officers, and directors, (2) the Judge to whom this case is assigned and the Judge's immediate family, (3) persons who execute and file a timely request for exclusion from the Class, (4) persons who have had their claims in this matter finally adjudicated and/or otherwise released, and (5) the legal representatives, successors, and assigns of any such excluded person.

47. **Numerosity:** The exact number of members of the Class is unknown and is not available to Plaintiff at this time, but individual joinder in this case is impracticable. The Class likely consists of thousands of individuals. Class members can be easily identified through Defendant's records.

48. **Commonality and Predominance:** There are many questions of law and fact common to the claims of Plaintiff and the other members of the Class, and those questions predominate over any questions that may affect individual members of the Class. Common questions for the Class include but are not limited to the following:

- a) Whether Defendant, through the WatchESPN Channel, unlawfully disclosed and continues to unlawfully disclose its users' personally identifiable information, including their video viewing records, in violation of 18 U.S.C. § 2710(b);
  - b) Whether Defendant's disclosures were committed knowingly;
  - c) Whether Defendant disclosed Plaintiff's and Class members' personally identifiable information without their consent; and
  - d) Whether Defendant violated Plaintiff's and Class members' right to privacy.

49. **Typicality:** Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and the Class sustained damages as a result of Defendant's uniform wrongful conduct during transactions with Plaintiff and the Class.

50. **Adequate Representation:** Plaintiff will fairly and adequately represent and protect the interests of the Class, and has retained counsel competent and experienced in complex litigation and class actions. Plaintiff has no interests antagonistic to those of the Class, and Defendant has no defenses unique to Plaintiff. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the members of the Class, and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other members of the Class.

51. **Policies Generally Applicable to the Class:** This class action is appropriate for certification because Defendant has acted or refused to act on grounds generally applicable to the Class as a whole, thereby requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class, and making final injunctive relief appropriate with respect to the Class as a whole. Defendant's policies challenged herein apply and affect members of the Class uniformly and Plaintiff's challenge of these policies hinges on Defendant's conduct with respect to the Class as a whole, not on facts or law applicable only to Plaintiff. Defendant has acted and failed to act on grounds generally applicable to Plaintiff and the other members of the Class, thereby requiring the Court's imposition of uniform relief to

ensure compatible standards of conduct toward members of the Class. The factual and legal bases of Defendant's liability to Plaintiff and to the other members of the Class are the same, resulting in injury to the Plaintiff and to all of the other members of the Class. Plaintiff and the members of the Class have suffered harm and damages as a result of Defendant's unlawful and wrongful conduct.

52. **Superiority:** This case is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy. The injuries suffered by the individual members of the Class are likely to have been relatively small compared to the burden and expense of individual prosecution of the litigation necessitated by Defendant's actions. Absent a class action, it would be difficult, if not impossible, for the individual members of the Class to obtain effective relief from Defendant. Even if members of the Class themselves could sustain such individual litigation, it would not be preferable to a class action because individual litigation would increase the delay and expense to all parties and the Court and require duplicative consideration of the legal and factual issues presented herein. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered, and uniformity of decisions will be ensured.

53. Plaintiff reserves the right to revise the foregoing “Class Allegations” and “Class Definition” based on facts learned through additional investigation and in discovery.

**FIRST CAUSE OF ACTION  
Violations of 18 U.S.C. § 2710  
(on behalf of Plaintiff and the Class)**

54. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

55. Defendant is a “video tape service provider[]” as defined by the VPPA because it “engage[s] in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery or prerecorded video cassette tapes or similar audio visual materials,” 18 U.S.C.

1 § 2710(a)(4), because it provides video (*i.e.*, “similar audio visual materials” under the VPPA’s  
 2 definition) to consumers via its WatchESPN Channel.

3       56. Plaintiff is a “consumer” as defined by the VPPA because he downloaded,  
 4 installed, and watched videos using the WatchESPN Channel. 18 U.S.C. § 2710(a)(1). As such,  
 5 he was a “subscriber” of “goods or services from a video tape service provider.” *See id.*  
 6 Additionally, because Defendant grants him a temporary license to access and view specific  
 7 videos in exchange for him being exposed to Defendant’s advertisements, Plaintiff is also a  
 8 “renter” of video content from Defendant.

9       57. Under the VPPA, the term “personally identifiable information” “includes  
 10 information which identifies a person as having requested or obtained specific video materials or  
 11 services from a video tape service provider.” 18 U.S.C. § 2710 (a)(3). The definition’s usage of  
 12 the word “includes” means that a more expansive reading of the term was expressly  
 13 contemplated.

14       58. While the WatchESPN Channel was installed on his Roku, Plaintiff viewed  
 15 numerous video clips using the channel. On information and belief, during these occasions, the  
 16 WatchESPN Channel knowingly sent Plaintiff’s PII—including his Roku’s serial number and  
 17 records identifying the videos that he viewed—to the third-party data analytics company Adobe.

18       59. As detailed more fully in Section II.A above, the information disclosed by the  
 19 WatchESPN Channel—the combination of the Roku serial number and video viewing records—  
 20 constitutes “personally identifiable information” in this context because Adobe adds it to their  
 21 existing consumer profiles to associate specific individuals with their viewing records.

22       60. Thus, Defendant’s disclosure of Plaintiff’s Roku serial number and video viewing  
 23 records allowed Adobe to identify him and attribute his viewing choices to his profile.

24       61. Consistent with this view, the National Institute of Standards and Technology  
 25 (NIST) defines “personally identifiable information” as “any information that can be used to  
 26

distinguish or trace an individual's identity.”<sup>16</sup> As discussed in Section II and throughout this Complaint, Plaintiff's Roku serial number and video viewing records is used by Adobe to distinguish or trace his identity.

62. The WatchESPN Channel’s transmissions of Plaintiff’s PII to Adobe constitute “knowing[] disclosures” of Plaintiff’s “personally identifiable information” to a person as contemplated by the VPPA. 18 U.S.C. § 2710(a)(1).

63. At no time did Plaintiff ever provide ESPN with any form of consent—either written or otherwise—to disclose his PII to third parties.

64. Nor were ESPN's disclosures made in the "ordinary course of business" as the term is defined by the VPPA. In particular, the WatchESPN Channel's disclosures to Adobe were not necessary for "debt collection activities, order fulfillment, request processing, [or] the transfer of ownership." 18 U.S.C. § 2710(a)(2).

65. As a result of Defendant's wrongful disclosures, Plaintiff and the Class have had their statutorily defined right to privacy violated. Plaintiff seeks an injunction to prohibit ESPN from releasing his and the Class's PII in the future, as well as the maximum statutory and punitive damages available under the VPPA. 18 U.S.C. § 2710(c).

## PRAYER FOR RELIEF

Plaintiff Chad Eichenberger, on behalf of himself and the Class, respectfully requests that this Court enter an order:

A. Certifying this case as a class action on behalf of the Class defined above, appointing Plaintiff Eichenberger as representative of the Class, and appointing his counsel as Class Counsel;

B. Declaring that Defendant's actions, as set out above, violate the VPPA, 18 U.S.C. § 2710;

<sup>16</sup> NIST Guide to Protecting the Confidentiality of Personally Identifiable Information (PII), <http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf> (last visited Feb. 17, 2014).

C. Awarding injunctive and other equitable relief as necessary to protect the interests of the Class, including, *inter alia*, an order prohibiting Defendant from engaging in the wrongful acts described herein;

D. Awarding damages, including statutory damages of \$2,500 per violation, and punitive damages, where applicable, in an amount to be determined at trial pursuant to 18 U.S.C. § 2710(c);

E. Awarding Plaintiff and the Class their reasonable litigation expenses and attorneys' fees;

F. Awarding Plaintiff and the Class pre- and post-judgment interest, to the extent allowable; and

G. Awarding such other and further relief as equity and justice may require.

## JURY TRIAL

Plaintiff demands a trial by jury for all issues so triable.

Respectfully submitted,

**CHAD EICHENBERGER**, individually and on behalf of all others similarly situated,

Dated: June 30, 2014

By: /s/ Benjamin H. Richman  
One of Plaintiff's Attorneys

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## **CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2014, I electronically filed the above and foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Benjamin H. Richman